No. 76-1767

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

This case does *not* involve price fixing. It involves a principle of professional ethics which extensive uncontroverted evidence showed to be reasonable and in the public interest. The courts below held that consideration of that evidence was barred by the *per se* rule.

In Point 1A of its Brief [1] the Government argues that the rule of reason does not apply here because NSPE's ethical canon is unreasonable in operation. In Point 1B of its Brief,[2] the Government argues that the *per se* rule applies here because the ethical canon is price-fixing.

The first of these contentions is question-begging. The second is name-calling.

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[1] Brief for the United States in Opposition at 13-17.

[2] *Id.* at 17-18.

To advance its first contention, the Government argues that the lower courts considered the reasonableness of the ethical provision "in terms of its actual operation and practical competitive impact." [3] The lower courts, by their own account, did no such thing. The District Court, having determined to apply the *per se* standard, stated that "the Court's inquiry is ended and it need not consider the reasonableness of the ethical proscription." [4] The Circuit Court, having determined to affirm use of the *per se* standard, stated that "There was no need for the district court to embark on protracted findings on matters that it considered, in the last analysis, to be unavailing as a defense." [5] Thus, no Government argument can establish the converse of this fact: The lower courts in this case explicitly rejected consideration of the evidence of reasonableness.

To support its second contention—that this is a price fixing case and hence *per se* applies—the Government asserts that the lower courts found price fixing here. But what did the lower courts actually find? The District Court did *not* find, nor could it, that this case involved the exchange of prices among competitors in any way. What the District Court concluded was that "In order to be characterized as price fixing . . . it need only be established that the suspect conduct acts to restrain free price movement." [6] The Circuit Court perfunctorily affirmed that analysis.[7] We ask this Court to consider, in deciding whether to hear the case, these questions:

—Is an ethical injunction against supplying a diagnosis without prior client consultation "price fixing"?

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[3] *Id.* at 20.

[4] 389 F.Supp. at 1199; *see also*, 404 F.Supp. at 461 (on remand).

[5] Appendix to Petition for Certiorari ("Cert. App.") at A-8.

[6] 389 F.Supp. at 1199.

[7] Cert. App. at A-11.

—Does an ethical principle against fee bidding for professional work before the facts on which the fee must be based are known illegally "restrain free price movement"?

—Is a professional society which asserts such principles a "price fixer"?

—Is it *per se* illegal to promulgate ethical principles regarding solicitation of professional engagements?

—Are professional ethics regarding methods of solicitation presumptively unlawful under the antitrust laws? If so, is the presumption irrebutable under the *per se* rule?

—Should the courts apply an irrebutable presumption of illegality under the *per se* rule in a case of first impression without considering the evidence of record relating to reasonableness and justification?

—How can any professional ethics be promulgated or maintained without judicial consideration of their reasonableness when attacked?

The Government Brief addresses none of these questions, but simply and expediently seeks to portray this as a price fixing case. Essentially, the Government Brief substitutes the epithet "price fixing" for legal analysis, and reduces the term "price fixing" from a specific antitrust offense to a rhetorical device, or slur.

To foster the erroneous impression that this case involves price fixing, not ethical standards, the Government Brief refers to fee schedules and to Section 9(b) of NSPE's Code of Ethics, neither of which is at issue here and neither of which is even mentioned in the complaint. Beginning long before this Court's decision in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and continuously thereafter, NSPE has stated to both lower courts at every opportunity that it does not now nor has it ever had a fee schedule, that it makes no defense of

fee schedules, that it does not defend anyone else's fee schedule, and that it is perfectly amenable to relief which prohibits it from acting with respect to fee schedules. NSPE's attorneys have stated to attorneys for the Government since before this case was submitted to the District Court, and continuously to date, that NSPE will not be baited into defending fee schedules in any way. But instead of permitting the case to go forward on the issue of principle for which it was defended—whether ethics which prohibit bidding before the facts can be known are *per se* illegal—the Government persists in trying to paint this as a fee schedule case. That portrayal evades the issues presented, and amounts to guilt by association with others who do have fee schedules.

Similarly, the Government Brief erroneously asserts that NSPE has "enforced" the ethical canon.[8] However, the alleged "enforcement," even as the Government characterizes it, consisted of distributing educational "pamphlets to members and customers," publishing "interpretations of the Code in the NSPE magazine," making public "speeches," [9] and exhorting Government agencies.[10] (Indeed, NSPE exhorted Government agencies to do precisely what Congress has commanded them to do.)[11] Since when do these palpably legitimate exercises of basic First Amendment rights constitute "enforcement" of a "price-fixing conspiracy"? Is public debate of an issue equivalent to illegal "enforcement" of one's beliefs? Why, when it discusses so-called "enforcement," does the Government Brief fail to mention that the District Court found that "no person has ever been expelled from *or in any way disciplined* by NSPE for engaging in" fee bidding? [12]

[8] Brief for United States in Opposition at 6.

[9] *Id.* at 6-7.

[10] *Id.* at 8.

[11] *See* Petition for Certiorari at 17-20.

[12] 389 F.Supp. at 1214 (emphasis added).

In drafting its Brief, the Government was aware of this Court's recent decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, —— U.S. ——, 45 L.W. 4828 (June 23, 1977), repudiating the indiscriminate use of *per se* in antitrust cases. Thus, in contrast to its formulation of the issue in its Circuit Court brief (whether the NSPE canon is "a *per se* violation of Section 1 of the Sherman Act"),[13] the Government's Brief to this Court does not refer to "*per se*" in its formulation of the question presented, but suggests more generally that NSPE's ethical canon "violates" the Sherman Act.[14] The Government appears to back away from full defense of the exclusionary *per se* rulings of the lower courts in this case.

The Government Brief's reformulation of the antitrust issue presented; its retreat from *per se;* and its unsupportable, last-minute suggestions that the lower courts did in fact consider the evidence of reasonableness, are all understandable in light of the Court's opinion in *Continental T.V.* After quoting with favor Chief Justice Hughes' statement that in antitrust matters "Realities must dominate the judgment. . . . The Anti-trust Act aims at substance" (*Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360, 377 (1933)), and after favorably noting its decision in *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963) ("We need to know more than we do about the actual impact of these arrangements. . . ."), the Court in *Continental T.V.* said this:

> Since the early years of this century a judicial gloss on [Section 1 of the Sherman Act] has established the rule of reason as the prevailing standard of analysis. . . . *Per se* rules of illegality are appropriate only when they relate to conduct that is mani-

[13] *National Society of Professional Engineers* v. *United States*, No. 76-1023 (D.C. Cir.), Brief for the United States of America at 1.

[14] Brief for the United States in Opposition at 2.

festly anti-competitive. [45 L.W. at 4831 (citation omitted).]

The Government Brief, like the lower court opinions in this case, lost sight of the origin and the purposes of the *per se* concept, described by this Court in *Continental T.V.* In so doing, the Government and the lower courts disregarded the injunction of this Court in *White Motor Co.*: "We need to know more. . . ." The tragedy of the instant litigation is that, in five years of legal proceedings involving this case of first impression, the judiciary has never addressed or made any findings with respect to the record evidence regarding the evils of fee bidding in engineering. The courts "need to know more" before they finally refuse to weigh that evidence.

Throughout the litigation, the Government previously argued that NSPE's prohibition of fee bidding is *per se* illegal because, allegedly, it indirectly bears on pricing. Now the Government concedes for the first time that "restrictions that may potentially affect price" may in some circumstances be properly judged under the rule of reason.[15] In that regard, the Government cites *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918), in which the Court upheld as reasonable the absolute fixing of commodity prices during hours the commodity exchange was closed.[16] However, the Government Brief does not provide any guidance as to what distinguishes price-related arrangements which are to be measured by the *per se* rule from those to be measured by the rule of reason. We suggest that prohibitions—like those involved in *Chicago Board of Trade* and here—which regulate the time at which prices may be quoted, in order to promote safe and orderly commerce, are to be measured by the

[15] *Id.* at 20.

[16] In *Chicago Board of Trade*, this Court noted the Government's contention that the case involved price fixing; the Court applied the rule of reason. Justice Brandeis' opinion called the Government's characterization "a bald proposition." 231 U.S. at 238.

rule of reason. Conversely, agreements which establish the prices which competitors will charge should be measured by the *per se* rule.

The ethical prohibition on fee bidding at issue here in no way regulates the price a client is charged, nor does it limit a client in selecting an engineer. Rather, the ethical provision relates exclusively to the time an engineer may properly quote a fee: after he has preliminarily learned the facts in consultation with the client, who has selected the engineer subject to unlimited fee negotiations thereafter. Should the client and the initially-selected engineer fail to reach a fee arrangement, the client is entirely free to look elsewhere.

The Government Brief also conspicuously omits reference to the Court's recent decision involving professional ethics, *Bates and O'Steen* v. *State Bar of Arizona*, —— U.S. ——, 45 L.W. 4895 (June 27, 1977). There the Court held that (1) the Arizona Supreme Court's imposition of a prohibition against all advertising by lawyers is not subject to Sherman Act attack, and (2) appellants' First Amendment rights were infringed by the State Bar's prohibition of their advertisement of routine legal services. Noting that it was not called upon "to resolve the problems associated with in-person solicitation of clients," 45 L.W. 4899, this Court concluded that the particular advertisement before it would not adversely affect professionalism. *Id.* at 4900. The Court's holding was carefully limited to advertisements of "routine" legal services, *id.* at 4901, such as "the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like. . . ." *Id.* According to the evidence in the instant case which the lower courts refused to consider, in professional engineering there is no counterpart to such routine legal services as the foregoing; each engineering assignment is necessarily unique. *See* Petition for Certiorari at 4-5. More fundamentally, the lower courts in the instant case, unlike this Court in

Bates and O'Steen, struck down an ethical principle relating to solicitation of professional services which no one even argues are routine: design of nuclear power plants, skyscrapers, air bases, stadiums, and the like. Further, the courts enjoined any advocacy of the principle. This, NSPE contends, is incompatible with the principle expressed in *Bates and O'Steen*.

II.

The last time it came before this Court in this case, on its Motion to Affirm, the Government contended that the judgment herein was perfectly consistent with the First Amendment.[17] Now the Government's Brief "does not contest" [18] the Circuit Court's finding that the decree violates the First Amendment in certain respects, but the Government contends that the abridgement of NSPE's First Amendment rights is not pervasive, as NSPE contends, and does not warrant review.

Examination of the judgment itself demonstrates that, contrary to the Government's Brief, NSPE would be enjoined from ideological speech by its entry. To cite one illustration, the judgment would enjoin NSPE from contending that the relief in this case is "contrary to the public interest." [19] The judgment would enjoin NSPE from "implying" that fee bidding is unprofessional.[20] The judgment would prohibit NSPE from publishing articles whose purpose was to persuade public officials to adopt legislative policies.[21]

The Government Brief erroneously asserts that NSPE did not raise its First Amendment contentions in the Dis-

[17] *National Society of Professional Engineers* v. *United States*, No. 74-872, Motion to Affirm at 15-16.

[18] Brief for The United States in Opposition at 24.

[19] *See* Petition for Certiorari at 23-24.

[20] *Id.*

[21] *Id.*

trict Court on remand. To the contrary, not only did NSPE submit to the District Court its Supreme Court briefs on that point,[22] it also specifically asked for a hearing on it. However, the request for a hearing was not granted, and the District Court instead again rubberstamped the judgment originally offered by the Government's attorneys, without changing a single word.

III.

The Government Brief suggests that NSPE should be treated severely because it did not acquiesce in a consent decree as have other professional societies recently pursued by the Government.[23] Indeed, the Government Brief cites such consent decrees,[24] although it is axiomatic that they have no precedential value.[25] Similarly, the Circuit Court opinion states that the Society's "all-out resistance to the lawsuit" justifies the breadth of the decree,[26] and the Circuit Court opinion suggests that a "decree more limited in its objectives and restraints" [27] would have been more appropriate had the Society not vigorously asserted its defense in the courts. Thus are defendants in civil antitrust cases brought by the Government warned that if they dare to state a defense in court and take appeals, these facts will be cited against them as justifying overbreadth of the judgment entered. Such endorsements of Governmental coercion should not

[22] *E.g.*, *National Society of Professional Engineers* v. *United States*, No. 74-872, Jurisdictional Statement at 23: "6. The final judgment abridges NSPE's First Amendment rights by prohibiting NSPE from expressing or advocating a policy it considers essential to the public safety and welfare."

[23] Brief for the United States in Opposition at 9.

[24] *Id.*

[25] *See* 15 U.S.C. § 16(a) (Supp. V 1975).

[26] Cert. App. at A-26.

[27] *Id.*

be ratified by this Court. The doctrine stated by the Circuit Court is itself an abridgement of the right of free speech as well as of due process.

IV.

As antitrust law now stands, the rule of reason applies to restraints involving bidding for professional football players' services (*Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976)), and the *per se* rule applies to bidding for professional engineering services. Nothing in the Government's Brief suggests a resolution of this unseemly situation and the conflict between the circuits, or shows why the Court should not review this case. Only this Court can guide the professions now.

Respectfully submitted,

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